IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1207

WALTER THOMAS ALLANSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF PETITIONER

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BLEED THROUGH

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BRIEF OF PETITIONER

The Petitioner, WALTER THOMAS ALLANSON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Georgia.

OPINIONS BELOW

Petitioner was tried and convicted in Fulton Superior Court on October 18, 1974. He appealed to the Supreme Court of Georgia. The opinion of the Court, cited as *Allanson v. State*, 235 Ga. 584, appears as Appendix A. Motion for rehearing was denied on November 24, 1975.

JURISDICTION

The jurisdiction of this appeal is grounded on the October 28, 1975 decision of the Supreme Court of Georgia denying Petitioner's appeal of his conviction for murder. A Petition for Rehearing was likewise denied on November 24, 1975. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. Section 1254.

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's rights under the Fourteenth Amendment were violated by the admission of testimony concerning a separate unindicted criminal act where there was no evidence shown connecting Petitioner with the prior act and no limitation placed on the manner in which the jury could receive such evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On June 29, 1974, 5 days prior to the crime which was on trial, an incident transpired on Truman Mountain Road near Lake Lanier in Forsyth County, Georgia, which involved nine bullets being shot into the automobile of Walter Allanson.

Investigator Satterfield of the Forsyth County Sheriff's Office testified that he had discovered six spent cartridges from a .22 caliber weapon in an underbrush

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area overlooking the road. (State's Exhibit 13). Witness Satterfield also stated that in the same area where the shells were found, limbs of trees had been cut off and placed so as to create a blind spot to anyone coming down the road (T-152). At the time the witness interviewed Walter and Milford Allanson, both parties were bleeding from cuts on their arms (T-154). Counsel for the Appellant objected to testimony of Mr. Satterfield on the grounds of relevancy (T-156). The State argued that the evidence was relevant in that it had a bearing on "intent, motive, identification, bent of mind, and a continuous scheme and transaction." (T-156). Pending the showing of a logical connection, the trial court allowed the prosecutor to proceed on the theory of intent, motive, identification, bent of mind and continuous scheme and transaction (T-159).

Witness Mary Rena Jones, prorietor of a grocery store, testified that on June 29 she saw a light blue pickup truck driving down Highway 53 at approximately 9:30 a.m. On cross-examination she stated:

Q: Wouldn't it refresh your recollection that you simply identified (to investigating officers) a blue and white truck and *you never mentioned who it belonged to.* (Emphasis Ours).

A. Well, I knew who it belonged to.

Q. That's right, and you're assuming that you saw Mr. Allanson in it, is that correct?

A. Right.
(T-173, 174).

Mrs. Jones later continued when further questioned along the same lines:

Q. Did you see him (Petitioner) driving the truck that day?

A. Well, I just saw the truck and I *assumed* it was him driving his own truck (T-179). (Emphasis Ours).

The only other witnesses the State offered to show the identity of the perpetrator was Mrs. Dorothy Ogletree. She was a resident of the lakeside community where the victims lived. She testified over objection that at approximately 9:00 a.m. on the 29th she observed a light blue truck with a *white camper top* drive by (T-231). At no time did she attempt to identify Petitioner.

The events described by these witnesses merely placed a blue truck with a white camper within several miles of the scene at the time within an hour of the shooting. The defense established the impossibility of the Petitioner's presence at this time and location. The location of the shooting at Lake Lanier is some 50 to 60 miles *north* of Atlanta. The shooting took place between 9:30 and 10:00. James Strickland, a filling station employee, remembered seeing Petitioner getting gas at his station in Barnesville, Georgia around 10:00 on June 29th (T-701). Barnesville is 30 to 40 miles *south* of Atlanta. He testified that Petitioner was driving a blue pickup truck without any camper and pulling a green horseshoe trailer.

Robert Warr testified that he delivered a parcel post package to Petitioner's home in Zebulon, Georgia at 11:00. The blue truck was in the yard with no camper body (T-733, 739). This location is approximately 70 miles from Lake Lanier.

At 12:00 Bobby Jackson was going to a steer roping contest driving on I-20, 20 miles east of Atlanta. He passed Tom Allanson driving east on I-20 in the blue

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pickup with no camper. He was pulling a green horseshoe trailer (T-711, 720).

Mrs. Bobby Jackson, a school teacher, was with her husband and testified to the same event as her husband (T-720, 725).

Milton Smith of Lithonia had employed Tom Allanson to shoe his horses on June 29, 1974. At 10:00 he received a telephone call from Tom Allanson in Barnesville, Georgia stating that they were running late. Allanson arrived at approximately 12:30. His truck had no camper and he was pulling a shoeing trailer. Allanson worked until approximately 5:00-6:00 (T-724, 732).

Three other witnesses testified that the truck driven by Allanson did not have a camper on June 29, 1974, the date State's witnesses identified a truck with a white camper being near Lake Lanier.

The evidence of the lake incident was objected to on numerous grounds and the objections were renewed following the witnesses being excused. (T-230, 249, 250). Objections were perfected on the basis that there was no showing of relevancy, no connection between the accused, and the evidence introduced separate and independent crimes. The Court agreed that the State would have to connect the evidence up and admitted it subject to later connection (T-251). There was no further testimony or evidence on this point and no further connection was ever made. A Motion for Mistrial was later made (T-658, 659), but denied by the Court despite the absence of further proof.

The testimony of the lake incident went to the jury without any limiting instruction or a prima facie showing of the *identity* of Tom Allanson as a party to the

event. Petitioner urged the error of the Court's ruling in the Supreme Court of Georgia. A thorough search of the appellate decisions of this state shows that the issue of the quantum of proof needed as a predicate to the introduction of separate crimes has never been reached in Georgia. Following the decision of the Georgia Supreme Court this appeal is taken.

REASONS FOR GRANTING THE WRIT

PART I

The admission into evidence in the trial of one accused of a criminal offense of evidence of a separate and distinct criminal act or crime is patently prejudicial and is allowable only under well defined exceptions to the general rule restricting such testimony. Underhill, Criminal Evidence §87, *Bacon v. State*, 209 Ga. 261 (1952), CJS Criminal Law §676 et seq.

Bacon v. State, supra, is the leading and most frequently cited Georgia case on this point. The *Bacon* case recognizes the exceptions under which prejudicial objections to other transactions might be overridden by the relevancy of that evidence. *Bacon, supra*, at 263. There is however the very critical requirement that the evidence offered have a "logical connection between the two." *Bacon* at 261.

It is a recognized principle that Constitutional Due Process may be violated by evidentiary matters when the result is to deny any citizen fundamental fairness. The aim of the requirement is to, "prevent fundamental unfairness in the use of evidence." *State v. Vaszorich*, 346 S. Ct. 219, 346 U.S. 900. It is axiomatic that due

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process also requires adherence to the adopted and recognized rules of evidence C.J.S. 16A §589.

Petitioner has previously noted that there are no cases in this State touching on the pivotal point raised herein. Certainly Petitioner does not argue against the exceptions to the general rule relating to evidence of other crimes. Petitioner urges, however, that there must be some reasonable showing of 1) the identity of the accused and 2) the fact that the other occurrence was committed by him. Any ruling by a State trial court which fails to consider these factors is error and results in a fundamental unfairness which rises to a violation of Petitioner's rights under the 14th Amendment to the United States Constitution.

With the circumstantial background of the State's case in chief, the prosecution offered the "lake incident." Objections were immediately raised (T-230, 249, 250). The Court, troubled by the issue, withheld ruling upon the assurance by the State that they would tie it in later (T-251). The Court noted:

> "Now, in failure of that showing, all of the testimony will be stricken." (T-251).

Petitioner shows this Court that there was not one element or scienter of further evidence offered which would even remotely connect Tom Allanson to the lake incident.

As previously noted Petitioner is not complaining of the recognized exceptions to the general rule relating to the other crimes, similar transactions, etc. These exceptions, however, must be cautiously allowed. In denying the Motion for Mistrial the Court found *Evans v. State*, 227 Ga. 571 (1971) controlling:

> "On a trial for murder, the previous difficulty between the defendant and the deceased is relevant in shedding light on the occurrence resulting in the homicide and illustrating the motive of the defendant." (T-654).

The *Evans* case correctly states the law; however, in that case, as in all others cited in Georgia, there was no dispute that the defendant was involved in the other transaction. The present case differs on this important point.

The crucial point in the trial court's ruling was reached when the court observed that his ruling was made in light of *Bacon, supra.*

> "(T)he Courts ruling was made in light of the *Bacon* case which says, ' . . . unless there can be some logical connection between the two from which it can be said that proof of the one tends to establish the other.' " (T-659).

Obviously the most important connection is proof that the accused also participated in the prior act. Petitioner notes that there is no probative evidence which connects the two events since the identify of the perpetrator of the lake incident was never established.

Although the fundamental reason for not allowing evidence of other crimes, etc., are clear, Petitioner would note the especially prejudical effect upon his trial. Such testimony as admitted here, without qualification destroys any fairness in a proceeding. As stated in *Paris v. U.S.* 260 F. 529 (9th Cir.) such evidence "tends to draw attention of the jury away from the consideration of the real issue on trial, to fasten it upon other questions, and to lead them unconsciously

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to render their verdicts on false issues rather than on the true issues on trial." *Paris, supra*, at 531.

The main case against Petitioner depended upon circumstantial evidence. The lake incident was even speculative. Thus, the combination of the issues was particularly harmful and the State "bootstrapped" a weak case with a weaker case. The combination of the two destroyed any fairness.

PART II

Georgia law has not directed itself to the basic threshold issue of what standard of proof is required in order to identify the perpetrator of an alleged prior transaction so that some logical connection can be drawn between the two independant acts. *Bacon* and *Evans, supra*, are often cited as standing for the proposition that other crimes may be admissible. These two leading Georgia cases are silent on the issue at hand as to what quantum of proof must first be offered to show the identity of the parties. *Bacon* and it's progeny show the reluctance of the courts to allow other crimes but do recognize that where there is a logical connection an exception is authorized. These cases leave unresolved the issue of the test of proof which is necessary to connect the acts.

Other States and the Federal Courts have resolved this issue by requiring that the proof of other acts or transactions must be accompanied by "*plain, clear*, and *conclusive* evidence." *U.S. v. Pollard*, 509 F. 2d 601 (5th Cir. 1975), *U.S. v. Vaughn*, 486 F. 2d 1318 (8th Cir. 1973). The Eight Circuit noted that any evidence of other crimes must be "plain, clear and conclusive" or else the case must be reversed. *U.S. v. Spica*, 413 F. 2d 129 (1969).

Other States have also followed the "clear and convincing proof" standard. *Parnell v. State*, 218 So. 2d 535 (Fla., 1960). Evidence of other acts must be "clearly shown so that there can be no room for speculation in the minds of the jurors." *State v. Armstrong*, 183 N.W. 2d 205 (Iowa, 1971). Most other states have adopted the position that there must be "substantial evidence that is plain, clear, and conclusive." *Renzi v. State*, 320 F. 2d 711 (Del., 1974), *Tucker v. State*, 82 Nev. 127, 412 P. 2d 970 (1966).

As Petitioner has urged the proof offered relative to the lake incident was vague, uncertain and speculative. Certainly had Tom Allanson been on trial charged with the lake incident alone a directed verdict of acquittal would have been required.

Tennessee also follows the established rule and requires that two conditions precede any other crimes:

> "Obviously an absolute essential is that 1) a former crime has been committed, and 2) committed by the identical person on trial. Only then can identification of the accused in the pending case be aided by evidence of the independent crime." *Wrather v. State*, 179 Tenn. 666, 678, 169 S.W. 854 (1943).

Certainly as a minimum the State must be held to the above showing of identity as a predicate. The testimony relating to the alleged assailant at the lake can in no stretch of one's imagination be called "clear and convincing." Indeed, it is properly categorized as vague and uncertain. By admitting testimony of independent crimes, the authorship of which was not established by plain, clear, and convincing evidence Petitioner's Constitutional rights were violated.

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Petitioner shows that judicial scrutiny must be exercised carefully when a prosecution attempts to bolster a circumstantial case with a even more circumstantial completely separate act. A case almost identical factually to Petitioner's present situation was decided by the Arizona Supreme Court. In that case the court stated:

> ". . . it will be seen that so far as the incident at the lake is concerned, there is only circumstantial evidence that the defendant performed an act immediately and directly tending to be the commission of the crime of murder, and is as reasonably consistent with a hypothesis of innocence as with guilt. Although the evidence of the lake incident, if viewed in the light urged by the State, is fraught with much suspicion, a jury may not speculate upon suspicion to determine whether, in fact, a crime was there committed by the defendant. (The lake incident) should not have been admitted.
>
> There is no doubt the evidence of the incident at the lake was highly prejudicial in nature and the case must therefore be reversed." *State v. Hughes*, 102 Ariz. 118, 426 P. 2d 386 (1967).

It is somewhat unusual to find two cases as nearly identical as the Petitioner's. The Arizona Supreme Court refused to allow a jury to hear speculative testimony relating to an alleged previous attempt to commit murder. That Court held, as has every other jurisdiction reporting cases in point, that such evidence has no probative value and destroys a criminal defendant's right to due process of law. To protect a citizen from injustice the conduct of a trial must afford fundamental fairness. *State v. Vaszorich*, *supra*. The State courts must also follow the recognized rules of evidence C.J.S.

16A §688. The evidence offered in Petitioner's case is such that offends the principles of fundamental fairness and is violative of the 14th Amendment.

Thus, Petitioner asks this Court to rule upon the threshold question as to whether or not proof of other acts may be admitted without first reasonably establishing that the accused was involved in the other act. To authorize such testimony Petitioner submits that the quantum of proof must be plain, clear and conclusive as established in the well recognized rules of evidence. Absent such an offering no conviction is valid. Certainly the evidence in the present case fails to meet any acceptable due process standard and Petitioner's conviction should be reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within and foregoing Brief upon Lewis Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 20th day of February, 1976.

JOHN A. NUCKOLLS

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APPENDIX A

IN THE SUPREME COURT OF GEORGIA

No. 30352

WALTER THOMAS ALLANSON

v.

STATE OF GEORGIA

(Oct. 28, 1975)

NICHOLS, *Chief Justice.*

Walter Thomas Allanson was indicted and convicted of the murders of his mother and father. After receiving two life sentences to be served concurrently, the defendant's motion for new trial was overruled and the present appeal filed.

1. Five days prior to the victims' being murdered by shotgun blasts at close range, they had been in Forsyth County, Georgia, some 50 miles from their home, where approximately nine shots from a 22 caliber weapon had been fired into their automobile. Testimony was adduced which would authorize a finding that someone had cut tree limbs so as to create a blind to conceal the identity of the person shooting the 22 caliber weapon. One witness testified as to having seen the defendant's pick-up truck near such location on that day, and another witness testified as to having seen a truck which resembled the truck identified as being owned by the defendant. The first enumeration of error complains of the admission of this testimony. No contention is made that testimony of a prior attack by the

defendant (five days before the murder) upon the victims would not be admissible under the exceptions stated in *Bacon v. State*, 209 Ga. 261 (71 SE2d 615) (1952); but the contention here made is that circumstantial evidence that the defendant fired shots at the victims on such prior occasion would not authorize its admission into evidence.

Stated differently, the defendant's contention is that while circumstantial evidence would be admissible to show that he committed the crime charged, yet circumstantial evidence of another attempt on the victims would not be admissible and that only direct evidence of such other attack would be admissible to show a previous difficulty between the accused and the deceased.

In *Evans v. State*, 227 Ga. 571, 576 (4) (181 SE2d 845) (1971), it was held that circumstantial evidence that the defendant was involved in a prior shooting incident was admissible to show a previous difficulty between the defendant and the deceased. See also *Starke v. State*, 81 Ga. 593 (2) (7 SE 807) (1888). It was not error to admit the evidence of the incident which took place five days prior to the homicide.

2. The evidence disclosed that Walter O. Allanson was shot while in the basement of his home, that his wife was shot while on the staircase leading to the basement of their home as she was going down such stairs and at a time when she had reached approximately the fourth step from the bottom. Immediately prior to the time when the victims were shot, Walter O. Allanson had gone into the basement to investigate as a result of the telephone lines leading to the house having been cut sometime during that day and had

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hollered up from the basement that he had "him" cornered in the cubby hole and to get the children (grandchildren of the victims) out of the house. This was done by a neighbor who was also present in the house. Walter O. Allanson then hollered for his wife to bring him the rifle. As she was going down the steps with the rifle and when she was almost to the bottom, she screamed hysterically "Tommy, Tommy, Tommy." Immediately, she was shot and fell backward on the steps where she died instantly.

The second enumeration of error contends that the trial court erred in failing to instruct the jury without request that the res gestae statement by the defendant's mother, "Tommy, Tommy, Tommy," should be scanned with care if the jury should believe the statement attributed to the deceased was true.

"Complaint is also made of the failure of the court to give, in connection with the charge . . . a charge that the evidence in question 'should be received with great care, and weighed with caution,' if the jury should believe the statements attributed to the deceased to be true and should believe them to be part of the res gestae. Such an instruction would be appropriate as applied to dying declarations, but is not required as applied to evidence admitted as a part of the res gestae." *O'Neal v. The State*, 172 Ga. 526 (3) (158 SE 51) (1931). It was not error to fail to charge as contended in the second enumeration of error.

3. The third enumeration of error complains of an excerpt of the court's charge dealing with intent. After instructing the jury that intention is a material element in the crime charged and is capable of proof in more than one way, provided the jury believes that it

existed from the facts proven, and it may be inferred from the proven circumstances or by acts or conduct or may be presumed when it is a natural and necessary consequence of an act, the court charged: "The law presumes that every act which is in itself unlawful was criminally intended until the contrary is made to appear. The question of intent is for you, the jury, to determine." It is contended that the quoted charge constituted reversible error.

It has long been the rule that malice will be presumed in criminal cases where death is caused by a gun unless the State's evidence shows mitigating circumstances, justification or alleviation. See *Favors v. State*, 234 Ga. 80 (7) (SE2d) (1975) and "To kill by using a deadly weapon in a manner likely to produce death, will raise a presumption of intention to kill." *Moon v. State*, 68 Ga. 687 (7). *Davis v. State*, 233 Ga. 638, 639 (212 SE2d 814) (1975). Accordingly, while the charge complained of could be inappropriate in another type case, yet, where as here, the defendant is on trial for murder with a deadly weapon, the charge complained of shows no harmful error.

4. Under decisions exemplified by *Rooker v. State*, 211 Ga. 361 (3) (86 SE2d 307) (1955); *Beckworth v. State*, 183 Ga. 871 (3) (190 SE 184) (1937), it was not error to admit testimony, over objection, as to the defendant's not shedding any tears when told of his parents' deaths. The fourth enumeration of error is without merit.

5. The fifth enumeration of error complains of the failure of the trial court to grant a motion for mistrial. During the examination of the defendant's mother-in-law (a witness for the defendant), late in the afternoon

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of the fourth day of the five-day trial, remarks were made between counsel for the defendant and counsel for the State. A review of all colloquies between counsel while this witness was testifying discloses improper remarks by both counsel. No objection or motion for mistrial was made until the jury had been sent from the courtroom at the end of the hearing on that day. Counsel for the defendant then made a motion for mistrial based upon the improper remarks of the State's attorney. In overruiing the motion for mistrial, the court stated that to specifically instruct the jury with reference to the remarks would be somewhat untimely and relatively meaningless, but that a general instruction to the effect that the jury should disregard statements and comments of counsel in arguments to each other inasmuch as they are not witnesses and not under oath would be appropriate. The court then advised counsel for the defendant that if he would write out the exact language he would like charged and, if there were no objections from the State, he would instruct the jury exactly in accordance with his words. The trial was then recessed for the night, and the record does not disclose that any instructions were submitted or requested the following morning by counsel for the defendant and none were given.

The failure of counsel for the defendant to either submit a requested charge or to expressly object to the court's direction that he should prepare such a charge was a waiver of the motion for mistrial where such instructions would have cured any harm caused by the remarks made by the State's attorney. The decision not to submit a requested instruction, which the trial court was to give verbatim, must be construed as a trial tactic inasmuch as counsel for the defendant could

well have determined that no charge was preferable, insofar as the defense was concerned, to the general charge to disregard statements, comments and arguments of counsel to each other. This enumeration of error is without merit.

6. The sixth enumeration of error complains that the trial court erred in refusing to give four requested charges dealing with eye-witness testimony. Each of these requested charges warned the jury of the possible dangers of mistaken identification of an accused. In this case, as in *Young v. State*, 226 Ga. 553, 557 (7) (176 SE2d 52) (1970), the trial court stressed the necessity that the offense charged must be proved beyond a reasonable doubt, and it was not error to refuse to give the requested instructions. See also *Micaeli v. State*, 222 Ga. 361 (149 SE2d 803) (1966); and *Knight v. State*, 133 Ga. App. 808 (3) (212 SE2d 464) (1975). This enumeration of error is without merit.

7. The last enumeration of error contends that the evidence did not authorize the verdict. The evidence in this case, though circumstantial, amply authorized the verdict and the trial court did not err in overruling the motion for new trial on this ground.

Judgment affirmed. All the Justices concur.